The Death Penalty, Extradition, and the War against Terrorism: U.S. Responses to European Opinion about Capital Punishment

Kathryn F. King
Hampden Academy

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I. Introduction

On April 16, 2002, five men went on trial in Frankfurt, Germany, charged with conspiring to blow up a Christmas market in Strasbourg, France, on New Year’s Day, 2001.¹ Had the plot succeeded, it would have cost innocent lives and destroyed a fourteenth century masterpiece of Gothic architecture, the Cathedral of Notre Dame. But the plot failed. German police, alerted by French authorities, raided a number of Frankfurt apartments which had been under surveillance for nearly a year, and found bomb-making materials, detonation devices, automatic Scorpion rifles, forged identity papers, and a homemade video of the Cathedral of Notre Dame and the busy marketplace adjoining it.²

The trial will determine the guilt or innocence of five defendants who are charged in connection with the conspiracy.³ As the trial progresses, prosecutors expect evidence to show links among the alleged conspirators, their Britain-based organization (Al Tawhid), and Osama bin Laden’s terrorist organization, Al Qaeda. Perhaps more importantly, the trial will give the world strong evidence of just how truly global the reaches
of the Al Qaeda network, and other terrorist groups like it, are.\textsuperscript{4} Al Tawhid’s leader, Abu Musaab Zarqawi, is also a top Al Qaeda figure and is believed to be hiding in Iran. The five defendants are all Algerians, were trained in terrorist tactics in Afghanistan, and had practiced their skills in teams in Bosnia and Pakistan. Financing for their German cell appears to have come from international drug trafficking and credit card fraud. Documents forged in Thailand allowed the purchase of the bomb-making chemicals.\textsuperscript{5} At least one of the alleged Strasbourg conspirators has been linked with Zacarias Moussaoui, who is currently on trial in United States federal court in connection with the September 11 attacks, and who also appears to be connected to Richard Reid, the Briton charged with trying to detonate explosives in his shoes on a transatlantic flight. In addition to the five defendants being tried in Germany, four additional conspirators are in custody in France; and the alleged mastermind of the plot, Abu Doha, is in custody in Britain. The United States is seeking the extradition of Abu Doha to face charges in a foiled plot to bomb the Los Angeles International Airport on New Year’s Day, 2000.\textsuperscript{6}

The request for Doha’s extradition is only one of many instances post-September 11 in which the United States has found itself in pressing need of cooperation from European governments to further the urgent national interest of combating international terrorism, by finding, arresting, and bringing to trial those responsible for the attacks on New York City’s World Trade Center and the Pentagon. American need for European cooperation has made untenable — practically, if not philosophically — an isolationist approach to foreign policy, and has raised broad, interesting questions about ways in which the United States government may have to reconfigure its practices in order to preserve the European cooperation upon which we currently rely, and on which we will continue to rely, in the fight against international terrorism and international crime in general. One particularly interesting question is, to what degree will European opinion effect change in America’s use of capital punishment?

Based on past practice, the answer to that question would appear to be none. The United States government’s positions on a number of foreign policy issues have drawn sharp criticism from the European press and political leadership.\textsuperscript{7} However, according to Felix Rohatyn, former ambassador

\textsuperscript{5} \textit{Id.}
\textsuperscript{6} \textit{Id.}
\textsuperscript{7} Areas of contentiousness between the United States and Europe include trade policies, environmental protection, promotion of peace in the Middle East, Ameri-
to France during the Clinton administration, no single issue during his years in France evoked as much controversy or as much passion as did executions in the United States.\textsuperscript{8} The friction is generated essentially by the belief common to European governments (expressed in both domestic law and supranational agreements) that executions are contrary to human rights norms,\textsuperscript{9} as opposed to the position of the U.S. government. The U.S. government positions itself, through its constitution and laws, and generally through its international human rights agreements, as a champion of human rights; however, in treaties involving the death penalty, the U.S. Senate encumbers international human rights treaties with reservations that allow America to persist in the use of a punishment banned by European democracies.\textsuperscript{10}

A majority of American states as well as the federal government use capital punishment;\textsuperscript{11} in fact, Congress has recently expanded the cir-


\textsuperscript{9} Richard C. Dieter, \textit{International Perspectives on the Death Penalty: A Costly Isolation for the U.S.}, \textit{Death Penalty Info. Ctr.} (1999), available at http://www.deathpenaltyinfo.org/foreignnatl.html. Mr. Dieter, Executive Director for the Death Penalty Information Center (DPIC), describes in his report ways in which the international community has sought to limit the application of the death penalty (for example, the European Convention on Human Rights), and the U.S. response to these initiatives. His report also describes the international trend toward complete abolition of the death penalty and the U.S. reaction to that trend. Finally, his report notes the present and potential costs to the United States for persisting in the use of capital punishment.


circumstances in which capital punishment may be imposed. In ratifying international human rights agreements which include restrictions on the use of capital punishment, the United States Senate has historically attached reservations or concerns that are highly controversial and arguably invalid, because they appear to be incompatible with the object and purpose of the treaties. Supreme Court decisions, particularly those made over the last 25 years, have declined to declare the death penalty unconstitutional. With reference to the subject of this article, the court appears to lack a “decent respect for the opinions of mankind” in its refusal to apply international human rights norms regarding the death penalty to American capital appeals.

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13 See, e.g., U.S. Reservation to Article 6 of the International Covenant on Civil and Political Rights (ICCPR), UN Doc. ST/LEG/SER.E/13, at 175. See also the U.S. Reservation to the Covenant’s Article 7, restricting the reach of the article to that of the “cruel and unusual punishment” clause in the Eighth Amendment of the United States Constitution, which limits the Human Rights Committee to considering whether death row incarceration in the United States violates the United States’ own constitutional standards.

14 William Hauptman, Lethal Reflections: New York’s New Death Penalty and Victim Impact Statements, 13 N.Y.L. SCH. J. HUM. RTS. 439, 446-48 (1997) (tracing the history of death penalty jurisprudence in the United States and reviewing the holdings of Coker v. Georgia (433 U.S. 584 (1977)), Furman v. Georgia (408 U.S. 238 (1972)), and Gregg v. Georgia (428 U.S. 153 (1976)): respectively, that the death penalty is an unconstitutionally excessive punishment for rape; that death penalty statutes which cannot reasonably prevent juries from arbitrarily or capriciously imposing capital punishment are unconstitutional; but that the death penalty itself is not per se unconstitutional.) For an analysis of a number of controversies surrounding the use of capital punishment, including the use of capital punishment worldwide and the connections among international human rights law and American law, see Hugh Adam Bedau, The Death Penalty in America: Current Controversies (1997 ed.).

15 Declaration of Independence, para. 1 (United States, 1776).


We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant. While the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident,
However, analysis of two trends, together with an analysis of the United States’ actions at the procedural “window” of international extradition in our criminal justice system,17 argue for a more nuanced response. The trend toward globalization that has gained much momentum since the end of World War II, and especially since the end of the Cold War, includes a dark aspect of increased multinational crime, which has heightened state and international interests in obtaining jurisdiction over defendants whom governments wish to prosecute, convict, and perhaps execute. Thus, bilateral extradition treaties setting forth the terms and conditions by which a requesting government may obtain jurisdiction over a suspect have proliferated.18 Globalization also includes the happier trend toward a strengthening worldwide commitment to the identification and enforcement of international human rights norms. International agreements codifying human rights norms, such as the European Convention on Human Rights19 and the International Covenant on Civil and Political Rights,20 have been negotiated, signed, and ratified by a growing number of countries, consistently narrowing or completely abolishing the use of capital punishment; corresponding judicial or quasi-judicial institutions such as the European Court of Human Rights construe and enforce the provisions of these agreements.21

Because of the fundamentally different goals of human rights protection and criminal prosecutions, conflicts of laws questions have arisen. The issue of America’s use of capital punishment has more and more frequently been at the center of those conflicts. For example, when the United

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States requests, pursuant to a valid extradition treaty, that the British Foreign Office extradite a detainee to stand trial in America for a capital offense, to which law must the British government conform its response: To its own national law, which prohibits the death penalty? To its extradition treaty with the United States? To the requirements of the Second Optional Protocol to the International Covenant on Civil and Political Rights, which is considered binding on member states and includes a prohibition of capital punishment? The answer in Europe to those questions is generally that the language and fundamental principles of international human rights agreements must direct the manner in which an international agreement such as an extradition treaty is executed. The answer to such questions in America generally has been the opposite: The United States government has declined to conform its behavior to international standards where doing so would result in diminution of state sovereignty and supremacy of statutory and constitutional law. But by degrees, over the past fifteen years and particularly since the terrorist attacks on the Pentagon and New York City’s World Trade Center towers on September 11, 2001, the U.S. government’s refusal to consider European opinion on capital punishment as a violation of human rights has weakened. America’s changed position is particularly visible in its actions at the procedural window of international extradition.

This article is not an analysis of the moral, ethical, or legal arguments for or against the use of capital punishment. Rather, it examines the relationship between European opinion about the death penalty and prospects for American use of capital punishment in the future. Part II briefly reviews the death penalty’s abolition in Europe through national and international practice, and contrasts that with the use of capital punishment in the United States at the state and federal level. Part III explores the traditional, positive law indicators of American response to European opposition to capital punishment, including statutes, judicial opinions, and action with regard to the negotiation and ratification of international agreements, and compliance with obligations under such agreements. Part IV analyzes the outcomes of international extradition conflicts between the United States and various European governments in civil and analogous military contexts, and suggests that those outcomes collectively constitute an expanding, functional inroad into American use of capital punishment – an inroad cre-


23 Bassiouni, supra note 10, at 1169.
ated in direct response to European opinion. Finally, Part V suggests that, in light of pressing state concerns, the functional inroad will become more, not less significant in the future.

II. CAPITAL PUNISHMENT IN THE UNITED STATES AND EUROPE

A. European Practice

For all intents and purposes, the death penalty no longer exists in Western Europe. The extreme human rights abuses of the Second World War exercised what has been called "a strong humanizing and restraining influence on European politics."24 "While the tear was in the eye" from the experiences of World War II, the newly formed General Assembly of the United Nations adopted in 1948 the Universal Declaration of Human Rights, which proclaimed without qualification that everyone has the right to life.25 In the 1950s and 1960s, a number of international human rights treaties were drafted, including the International Covenant on Civil and Political Rights (ICCPR)26 and the European Convention on Human Rights (ECHR).27 Like the Universal Declaration on Human Rights, the ICCPR and the ECHR explicitly affirmed the right to life, but allowed for narrow use of capital punishment as an exception that could be employed only in very limited circumstances.28 Despite the fact that those treaties allowed limited use of the death penalty, many Western European nations simply stopped using it, even if they did not technically abolish it.29 Thus, by the 1980s de facto abolition of capital punishment was the norm in Western Europe.

Since the 1980s, additional international human rights agreements have been drafted and ratified with the goal of making abolition of capital punishment an international norm. Most notably, those agreements include

26 ICCPR, supra note 20.
27 ECHR, supra note 19.
28 See, e.g., ICCPR, supra note 20, arts. 3, 6, and 7; and ECHR, supra note 19, arts. 2 and 3.
should be made by the country itself." She continues, "...neither the quantity nor the type of human rights abuses, nor whether the abuses have already been documented by previous efforts, will determine the suitability or prescribability of official truth-seeking. A relatively small number of cases does not lessen the urgency of the issue. Instead, the primary measure to determine the importance of a truth commission is found in the desire for a truth-seeking process from within the society under question. It is hard to measure these sentiments in concrete terms. ...Opinion polls are unrealistic in most countries, and fear of speaking publicly about government abuses may continue long after...the departure of a repressive regime. Although there may be no means of formal measurement...governments should...be guided by expressed national preferences, especially those of the victims or groups that represent them. In those countries where there is a generalized lack of interest in or resistance to digging up the past, this is likely to be reflected at all political and societal levels: a preference for letting go, an uncomfortableness in talking of the past...Elsewhere, the demand for truth and accountability is made clear through public demonstrations, lobbying from victims or human rights organizations..."

Other reasons why a Truth Commission should be established are that it can:

- **Help establish the truth about the past:** Professor Makau Mutua writes, "Another function, which is probably the most important one, is that of truth telling, where the perpetrators bare all, and the victims recount the horrors visited upon them by the sadism of the state." "The ultimate goal of the truth commission, in fact its raison d'etre, is the search for truth," writes Charles Manga Fombad, Associate Professor of Law at the University of Botswana. Alex Boraine observes that, "one of the major advantages of a truth commission...is...inclusive truth telling." He proceeds to categorize these as the objective or factual or forensic truth; the personal or

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37 Id. at 186.
38 Id. at 201.
40 Mutua, supra note 6, at 3.
41 Boraine, supra note 21, at 291.
narrative truth; the social or dialogical truth; and the healing and restorative truth.\textsuperscript{42}

Writer Michael Ignatieff states: “The past is an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.”\textsuperscript{43} The aim here is for the truth commission to establish an “accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.”\textsuperscript{44} It establishes “a record of the past that is accurate, detailed, impartial and official. This record can serve to counter the fictitious or exaggerated accounts of the past that were propagated by the previous regime . . . and bring the true scale and impact of a violent past to the public consciousness.”\textsuperscript{45}

In this regard, it may not even be telling a new truth, rather it may be acknowledging or formally recognizing a truth that may be generally well known that is critical, especially where official denial was pervasive.

In Chile, survivors cite a public apology by the state during an emotional appeal for pardon and forgiveness by the President when releasing the Chillean truth report to the public as “a powerful moment after having their claims brushed aside for so many years.”\textsuperscript{46} Molly Andrews notes that, “the power of truth commissions lies not so much in discovering the truth — in the form of new facts — as in acknowledging it.”\textsuperscript{47}

- **Promote the accountability of perpetrators of human rights violations:** The evidence collected by a truth commission could be used in subsequent prosecutions, or to recommend other sanctions such as civil liability, removal from office, restitution or community service. An example of a country where evidence gathered by a Truth Commission has been instrumental in this regard is Argentina where it was used to quickly build cases against nine senior members of the previous regime.\textsuperscript{48} It should also be noted that, “Baltasar Garzon, the Spanish judge who brought charges against Augusto Pinochet,
plication to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law. . . . It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court from granting interim relief in order to ensure the full effectiveness of a judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.\(^4\)

Thus, the court concluded, if the UK court would find it useful or necessary to grant interim relief in order to secure rights under Community law, that court (more broadly, a court in any member state) is obliged to set aside a national rule prohibiting such relief.\(^4\) In response to the court's ruling, Lord Bridge of the House of Lords, with reasoning reminiscent of that in *Vabre*, wrote:

> Under the terms of the European Communities Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law . . . Thus, there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.\(^5\)

In *Golder*,\(^6\) a case referred in 1975 by the government of the United Kingdom to the ECHR, a complaint was made by an inmate in a British prison that prison rules made pursuant to an act of Parliament (the Prison Act of 1952) violated his rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR held that the

\(^{43}\) Factortame (ECJ), *supra* note 42, at I - 2473-74.

\(^{44}\) Factortame (ECJ), *supra* note 42.

\(^{45}\) Factortame (UK), *supra* note 37, at 108.

\(^{46}\) Golder, *supra* note 38.
prison rules and their execution constituted a breach of Articles 6 and 8 of the Convention; the British government subsequently changed its rules to comply with the Court’s decision. Together, Vabre and Factortame show the willingness of member states of the EU to pass to the Union some attributes of national sovereignty; read with Golder, those cases show a commitment by European nations to do so in the interest of protection of human rights.

Today, all members of the European Union have banned the death penalty. Abolition has been made a prerequisite for EU membership, giving Eastern and Central European nations who desire to join the EU strong incentives to prohibit the practice. In principle and in practice, Western European governments are unequivocally opposed to capital punishment.

B. American Practice

Since 1948, the U.S. has been a leader in the development of human rights norms; its influence is unmatched by any other country. U.S. constitutional terms and principles were incorporated into the “International Bill of Rights,” the collective term for three major human rights instruments — the U.N. Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights. But to the dismay and immense

47 Id.
48 See, e.g., Turkish Parliament, Looking to Europe, Passes Reforms, N.Y. TIMES, August 4, 2002, at A12. See also Daniel Simpson, Turks May Face Long Road to the European Union, N.Y. TIMES, Aug. 4, 2002, at A12 (discussing the Turkish Parliament’s abolition of the death penalty and adoption of other human rights reforms as part of Turkey’s campaign for EU membership).
49 See generally William A. Schabas, The Abolition of the Death Penalty in International Law (2d ed. 1997). Professor Schabas describes the articulation and evolution of international norms limiting the death penalty within the United Nations and international humanitarian law; he also analyzes evolving, expanding regional standards, both within the Council of Europe and the Organization of American States.
50 Bassiouuni, supra note 10, at 1169.
53 ICCPR, supra note 20.
is akin to therapy. It can perform the function of moral reconstruction, in which a country takes stock of its morality in politics, governance, cultural values and its view of humanity. Moral reconstruction implies learning lessons from the past and revising the nation's moral code. It could be a vehicle for reconciliation after truth and justice have been told and done. Here, society must pass judgment on what it has heard; it must, in effect, establish a moral account of the historical record.\textsuperscript{57} The Truth and Reconciliation Commission in South Africa had, at its public hearings, "a huge sign hung behind the panel of commissioners that read, Truth: The Road to Reconciliation. Posters promoting the commission coaxed, "Let's speak out to each other. By telling the truth. By telling our stories of the past, so that we can walk the road to reconciliation.'\textsuperscript{58} As we shall see later, however, achieving this aim remains contentious, and an issue that requires deep reflection.

\textbf{Help consolidate democratic transition:} A truth commission could "signal a formal break with a dark and violent past, and the transition to a more open, peaceful and democratic future. If they are successful, truth commissions can have the effect of weakening anti-democratic actors who might otherwise continue to pursue their goals outside the democratic process."\textsuperscript{59}

In the introduction of the \textit{Report of the Chilean National Commission on Truth and Reconciliation}, Commission member Jose Zalaquett summarizes the importance of a truth commission, thus: "[t]he truth [is] considered as an absolute, unrenounceable value for many reasons. In order to provide for measures of reparation and prevention, it must be clearly known what it is that ought to be repaired and prevented. Further, society cannot simply black out a chapter of its history, however differently the facts may be interpreted. The void would be filled with lies or with conflicting versions. The unity of a nation depends upon a shared identity, which, in turn depends largely on a shared memory. The truth also brings a measure of social catharsis and helps to prevent the past from recurring. In addition, bringing the facts to light is, to some extent, a form of punishment, albeit mild, in that it provokes social censure against the perpetrators or the institutions or groups they belonged to. But although the truth cannot really in itself dispense justice, it does put an end to many a continued injustice. It does not

\textsuperscript{57} Mutua, \textit{supra} note 6, at 3.

\textsuperscript{58} Hayner, \textit{supra} note 3, at 156.

\textsuperscript{59} Freeman & Hayner, \textit{supra} note 4, at 126-27.
bring the dead back to life, but it brings them out of silence; for the families of the ‘disappeared’, the truth about their fate would mean, at last, the end of an anguishing, endless, search. . .”

Conversely, a truth commission should not be established if the people do not recommend it. Alex Boraine, the vice-chair of the South African Truth and Reconciliation Commission notes: “On the other hand, there are powerful voices that urge that the way to deal with the past is to forget and move on. . .for many of them it is not a question of ignoring the atrocities that have been committed so much as a concern to consolidate and protect our newly emerging democracy. Of course, there are some who simply wish to ignore the past because of their own involvement in it. But there is a defensible position which calls for moving on into the future and not allowing the past to destroy or inhibit the new democracy.”

And Timothy Garton Ash observes: “There is profound insight of the historian Ernest Renan that every nation is a community both of shared memory and shared forgetting. ‘Forgetting,’ writes Renan, ‘and I would say even historical error, is an essential factor in the history of a nation.’ Historically, the advocates of forgetting are many and impressive. They range from Cicero in 44 B.C., demanding just two days after Caesar’s murder that the memory of past discord be consigned to ‘eternal oblivion,’ to Winston Churchill in his Zurich speech 2000 years later, recalling Gladstone’s appeal for a ‘blessed act of oblivion between former enemies.’”

Yale University Professor Bruce Ackerman also says that “moral capital” is better spent in educating the population of the limits of the law rather than in engaging in a “quixotic quest after the mirage of corrective justice.” He cautions that any attempts at corrective justice will generate “the perpetuation of moral arbitrariness and the creation of a new generation of victims because of the inevitable deviations from due process that would attach to trials.”

Hayner commits a whole chapter of her book discussing this issue (titled “Leaving the Past Alone) and uses the cases of Mozambique and Cambodia

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61 Boraine, supra note 21, at 4.
62 Ash, supra note 20.
63 Bruce Ackerman, We The People: Transformations (1998).
64 Hayner, supra note 3, at 183-205.
When the United States has approved the treaty [the ICCPR] in 1992, it specifically reserved the right:

subject to its Constitutional constraints, to impose capital punishment

on any person (other than a pregnant woman) duly convicted under

existing or future laws permitting the imposition of capital punishment

for crimes committed by persons below eighteen years of age . . .

Finally, we note that even if the agreement were to ban the imposition of the death penalty, [it] is [not] binding on federal courts. ‘Courts in the United States are bound to give effect to international law and to international agreements, except that a non-self-executing agreement will not be given the same effect as law in the absence of necessary authority.’ [T]he International Covenant is [not] self-executing, nor has Congress enacted implementing legislation for [it].69

Just three years earlier, Michael Domingues challenged his death sentence in the State Supreme Court in Nevada.70 In that case, Domingues, who was convicted and sentenced to die for two murders committed when he was sixteen years old, moved for a correction of what he asserted was an illegal sentence.71 In his motion, Domingues argued that the execution of juveniles violates both customary international law as well as Article 6 of the ICCPR.72 The Supreme Court of Nevada, like the Sixth Circuit Court of Appeals, held that because the U.S. Senate ratified the ICCPR with an express reservation to Article 6, this provision of the treaty does not supersede

69 Id., at 372
71 Id.
72 Id.
state law, regardless of the object and purpose of the treaty.\textsuperscript{73} The U.S. Supreme Court subsequently denied Domingues' certiorari request.\textsuperscript{74}

In American executions of foreign nationals there is further evidence of disregard for international opinion about capital punishment. The United States has been a party to the Vienna Convention on Consular Relations since ratifying it in 1969,\textsuperscript{75} and has expressed no reservation to Article 36 of the Convention which requires an arresting authority to notify without delay an alien of his or her right to consular access, and to permit contact with the consul if requested.\textsuperscript{76} However, U.S. officials have consistently ignored Article 36 with regard to treatment of foreign nationals on American soil.\textsuperscript{77} This failure, which constitutes a clear violation of international law, has been unsuccessfully litigated in a number of U.S. death penalty cases.\textsuperscript{78}

\begin{footnotes}
\item[73] Id. Writing for the Nevada Supreme Court, Justice Young explained:

Domingues contends that pursuant to the ICCPR, imposition of the death penalty on one who committed a capital offense while under the age of eighteen is illegal. Although the United States Senate ratified the ICCPR with a reservation allowing juvenile offenders to be sentenced to death, Domingues asserts that this reservation was invalid and thus this capital sentencing prohibition set forth in the treaty is the supreme law of the land. Domingues contends that his death sentence, imposed for crimes he committed when he was sixteen years old, is thereby facially invalid. We disagree. We conclude that the Senate's express reservation of the United States' right to impose a penalty of death on juvenile offenders negates Domingues' claim that he was illegally sentenced. Many of our sister jurisdictions have laws authorizing the death penalty for criminal offenders under the age of eighteen, and such laws have withstood Constitutional scrutiny . . . . [W]e affirm the decision of the district court denying Domingues' motion to correct the sentence.

\item[75] Vienna Convention, supra note 55.
\item[76] Vienna Convention, supra note 55, at art. 36(b)(1).
\item[78] See, e.g., Breard v. Greene, 523 U.S. 371, 374 (1998). See also, Federal Republic of Germany et al. v. United States et al., 526 U.S. 111 (1999); Ledezma v. Iowa, 626 N.W.2d 134 (Iowa 2001), citing other recent, unsuccessfully litigated Article 35 cases. Id. at 151.
\end{footnotes}
RECOMMENDATIONS

The task force has engaged in a timely and useful exercise of public hearings to gauge whether or not Kenyans desire a truth commission. Based on its reading of the public mood, the task force is therefore fairly able to recommend whether Kenyans are agreeable to a truth commission or not.

Notably, after evaluating the examples of Mozambique and Cambodia, it is clear that their history has been characterized by internecine civil war; a phenomenon that, thankfully, did not happen in Kenya, which has a history of successive authoritarian regimes. In this regard, one would agree with the following excerpt from *Unspeakable Truths*:

Indeed, there are some examples around the world that seem to confirm the danger of allowing a country or its government the option of simply ignoring the legacy of past state crimes. African rights expert Richard Carver argues persuasively that several countries in Africa have suffered from such a policy, and that there have been clear negative long-term consequences from failing to come to terms with the past. For example, in Malawi, some of the repressive patterns of the past, such as laws allowing censorship, have received support from those who used to oppose them under the old regime. If these laws and the effects that they have “were properly exposed to public view, the repressive tendencies would still be there, but there would be greater public will to resist them,” says Carver.

Let us now turn to the specific questions regarding the formation of truth commissions.

1. How is a Truth Commission Formed?

Of the 21 truth commissions documented in *Unspeakable Truths*, 12 were created through executive decree (President, Prime Minister or Ministry of Government and Police), four were created through the legislature (although in Sierra Leone there had been an earlier agreement to form it through the peace accord), three were arrived at through the avenue of the United Nations, and two were formed by an independent political entity (the African National Congress – ANC – in South Africa).

A truth commission can be formed in Kenya through two visibly contending avenues. As Professor Makau Mutua has observed, “there are two possible routes for the establishment of a truth commission. The commission

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69 Hayner, *supra* note 3, at 184.
70 Id. at 305-11.
could to be established either as an independent organ by an act of parliament or through a presidential order under the powers granted him by the Constitution.\textsuperscript{71}

But the use of either of these methods will have different effects, which the Task Force needs to consider. As Mark Freeman and Priscilla Hayner observe, "in many countries, the way in which a truth commission is created will have a direct effect on what its powers can be. For example, in democratic countries with presidential or semi-presidential forms of governance, the executive branch of government usually cannot, on its own, confer search and seizure or even subpoena powers, which tends to be the exclusive preserve of the legislative branch. The same may also be true with respect to powers of reporting, including the question of whether the commission can make binding recommendations. Similarly, who establishes the commission can affect the allocation of funding, since one branch of government may have greater access to resources and a greater commitment to the commission's work."\textsuperscript{72}

Appointment by the President would be through the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya. The purpose of this Act is "to provide for the appointment of commissioners to inquire into and report on matters of a public nature referred to them by the President, to prescribe their powers, privileges and duties, and to provide for other matters relating thereto." To achieve this objective, the President is vested with powers to issue a commission to a commissioner or commissioners to inquire "into any matter into which an inquiry would, in the opinion of the President, be in the public interest."\textsuperscript{73} It is also provided that "every commission shall direct how the commission shall be executed."\textsuperscript{74}

The greatest strength of establishing a truth commission in this manner is that it fulfils the need for timeliness, which arises under the question of when a truth commission should be formed (tackled below). As we shall see when considering this question, the recommended and appropriate time to form a truth commission is immediately.

A truth commission that is established under the Commissions of Inquiry Act "shall have the powers of the High Court to summon witnesses, and to

\textsuperscript{71} Mutua, supra note 6, at 4.

\textsuperscript{72} Freeman & Hayner, supra note 4, at 129.

\textsuperscript{73} Commissions of Inquiry Act, § 3(1), Chapter 102 of the Laws of Kenya.

\textsuperscript{74} Section 3 (3) of Chapter 102 of the Laws of Kenya
tionality of specific statutes. Because *Furman* did not deem the death penalty per se unconstitutional, retentionist states and Congress could (and did) cure the procedural flaws in their capital punishment statutes, allowing executions to proceed.

Since the reinstatement of capital punishment in the U.S., some limitations on its use have been imposed. The Supreme Court in 1977 ruled that capital punishment is excessive, thus cruel and unusual, when imposed for the rape of an adult woman when the victim was not killed. Eleven years later, the court ruled executions of the legally insane unconstitutional. Five states since 2001 have banned execution of the mentally retarded; one state has formally declared a moratorium on death sentences, with another state experiencing a de facto moratorium while its state supreme court evaluates the constitutionality of its death penalty statute. Nine states and the federal government are currently conducting studies about their respective death penalty practices.

Notwithstanding these changes, however, the death penalty appears firmly entrenched in American criminal justice. Retentionist states seem

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88 Furman, *supra* note 86. In his concurrence, Justice Brennan wrote, "In sum, the punishment of death is inconsistent with all four principles [by which it may be determined whether a punishment is cruel and unusual]. . . . The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not." *Id.* at 305. Also concurring, Justice Marshall wrote, "There is but one conclusion that can be drawn from all of this — i.e., the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment." *Id.* at 358-59.

89 Dieter, *supra* note 11.

90 Coker v. Georgia, 433 U.S. 584 (1977). Justice White, writing for the Court, concluded that the sentence of death for the crime of rape is "grossly disproportionate and excessive punishment . . . and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592. Justice White explained that although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life. *Id.* at 598


92 Dieter, *supra* note 11.

interested in minimizing the potential for excessiveness and violations of due process in the use of capital punishment, but uninterested in banning its use. For example, Florida, while adopting heightened standards for the lead attorneys in capital cases and banning the execution of the mentally retarded, had on its general election ballot for November, 2002, a proposal to reduce the minimum age for execution of juveniles to sixteen years. New York’s state legislature in September of 2001 enacted an anti-terrorism law that expanded circumstances under which the death penalty may be used. Texas’s governor, while signing into law the “Texas Fair Defense Act” (which among other things increased state funding for defense counsel and criminal defense investigations for indigent defendants), vetoed a bill to prohibit the execution of the mentally retarded. One legislator in Texas has proposed allowing the execution of offenders as young as 11.

Despite two recent Supreme Court holdings, there is strong evidence that the use of capital punishment at the federal as well as the state level is firmly entrenched. On June 20, 2002, asserting a “national consensus against it,” the U.S. Supreme Court ruled that execution of the mentally retarded is unconstitutional. Four days later, the court also ruled unconstitutional a capital punishment sentencing scheme that would allow a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the court’s rulings left undisturbed the status of capital punishment as generally constitutional. The court has held that the Eighth Amendment does not prohibit the execution of juveniles who were as young as sixteen years old when they committed their offenses. And, with respect to the question of whether an international trend to abolish the death penalty for juveniles

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94 Id.
95 Id.
96 Id.
verely curtailed by Parliament as there is a considerable constituency within Parliament that is clearly threatened by the formation of a truth commission. It should not escape the mind of the task force that when their interests have previously been similarly threatened, some Parliamentarians have been as bold as to state that they would disable progressive legislation, as happened at the National Constitutional Conference when delegates' support of a provision to recall members of parliament in the draft constitution was met with a threat to withdraw legislative support. It is perhaps this weakness that Justice and Constitutional Affairs Minister Kiraitu Murungi was referring to when he lamented that "there are inherent structural limitations to radical reform in Kenya" as he opened the workshop organized by the task force titled: "A Truth, Justice and Reconciliation Commission For Kenya: Prospects and Obstacles on 4 July 2003.

Recommendation: Exercising Presidential Power under the Commissions of Inquiry Act is the way to go. There does not seem to be an intention in the current Presidency to interfere with the working of independent institutions and there is clear goodwill emanating from this office. In relation to the independence of the commission, it should be provided in its establishment that the truth commission shall not be subject to direction from any individual, institution or group.

2. When Should a Truth Commission be Formed?

It is clear that this should be undertaken immediately. Makau Mutua notes that "Kenya must establish a truth commission this year." He continues: "Truth commissions are created principally at the time of a state's transition toward a more democratic or participatory government, a government that espouses the ideals of democracy, of power bounded by law, of formal legal equality, and social justice. It matters not how the moment of political change occurred; it could have been violent or non-violent, such as Kenya's. What matters is that there is a normative and substantive departure by the successor government or state from its predecessor. Thus it could be change from autocracy to democracy, from opacity to transparency, from open shameless graft to fiscal and economic accountability. But that change must be structural, ideological, and fundamental, it cannot be a continuation of the same, the change must signal real and genuine regime change." Indeed, it should be noted that a defining characteristic that serves to define a truth commission is that it is, "usually created at a point

79 Mutua, supra note 6, at 4.
80 Id. at 2.
of political transition, either from war to peace or from authoritarian rule to democracy."\(^81\)

Moreover, at the point of political transition, there is often times great support for change and this can be used to create an environment that helps uncover and unlock secrets that have been hidden in the caves of history. It is instructive to look at, for example, the circumstances surrounding the declassification of top state secret files regarding Goldenberg by Attorney-General Amos Wako as widely reported by the media on June 18, 2003. Clearly, there is a need to take advantage of such cusps of public goodwill before they are eroded by political evolution. In this regard, Hayner observes: "Most countries are well served by a quick start to a truth commission. The political momentum and popular support for such an initiative are generally highest at the point of transition, as a new government takes power. . .and there is a narrow window to transform this momentum into serious reforms, purges of human rights abusers, or reparations for victims. A quick start to a truth commission can also have the secondary effect of holding off pressure for immediate reforms and other measures of accountability, giving the government time to take stock, plan and strengthen institutions as necessary to further its other transitional justice initiatives."\(^82\)

However, Hayner also points out an important exception to the "the quicker the better" rule. "South Africa spent eighteen months designing its Truth and Reconciliation Commission following democratic elections in 1994. This preparatory time was crucial to developing the commission's complex empowering legislation, to gain the backing from almost all political parties, and to seek input from many outside observers through which the proposed commission gained legitimacy. The Committee on Justice of the South African Parliament held over 150 hours of public hearings on the legislation, taking input from human rights organizations, victims, an association of former police officers, churches, and others. International human rights groups made submissions critiquing the draft legislation. And finally, after the legislation was in place, the very public process of selecting commissioners. . .added many months, but these steps greatly improved and strengthened the commission."\(^83\)

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81 Freeman & Hayner, supra note 4, at 125.
82 HAYNER, supra note 3, at 221.
83 Id. at 221-22.
Extradition is an area of international law that is closely connected to the principle of state sovereignty. It is "the surrender by one state to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of another, which, being competent to try and punish that individual, demands the surrender."\footnote{Black's Law Dictionary 585 (6th ed. 1990).} In short, extradition is the mechanism by which states cooperate with each other by agreeing to surrender fugitives to each other upon request.\footnote{Dina Maslow, Extradition from Israel: the Samuel Sheinbein Case, 7 CARDOZO J. INT'L & COMP. L. 387, 388 (1999).} Customary international law does not require that states extradite. However, most states enter into bilateral extradition treaties, thereby voluntarily accepting limitations on their sovereignty. Their willingness to do so stems from the principal goals of international extradition: (1) to obtain reciprocal return of fugitive offenders; (2) to effect punishment of wrongful conduct, thereby promoting justice; (3) to avoid becoming safe havens for fugitives; and (4) to avoid the international tensions caused by one country's refusal to return a fugitive.\footnote{Matthew Henning, Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents, 22 B.C. INT'L & COMP. L. REV. 347, 350-51 (1999).} 

As previously stated, the extradition process is generally embodied in bilateral treaties and accompanying extradition statutes. Treaties set forth inter-party procedures — that is, what procedural requirements a country must meet, as well as that country's rights — in an extradition proceeding.\footnote{See, e.g., Cheung v. United States, 213 F.3d 82, 85 (2nd Cir. 2000).} Procedural provisions commonly include requirements for how the accused is to be arrested, detained, and delivered. Treaties also generally include substantive rights of a fugitive facing extradition, an enumeration of extraditable offenses, and a list of exceptions to the obligation to extradite.\footnote{Maslow, supra note 110, at 388.} For example, a common exception included in extradition treaties is a reciprocal clause allowing for the non-extradition of nationals of the requested state. Also commonly included are capital punishment-related exceptions and political offense exceptions which are designed to protect political dissidents from being persecuted by national governments displeased by their dissent.\footnote{Id.}

Whereas treaties address inter-party procedure, the American federal extradition statute allocates responsibility for extradition within the
U.S. government to a judicial officer and the Secretary of State.\textsuperscript{115} Processing an extradition request involves both the executive and judicial branches of government, but is largely a matter of foreign policy controlled by a state’s executive power.\textsuperscript{116} When a foreign government seeks the extradition of an individual from the United States, it first submits a formal request to the State Department supported by any documentation required by the terms of the extradition treaty. If the request is approved by the State Department and the Department of Justice, the request is forwarded to the appropriate United States Attorney who files the request (generally with an arrest warrant attached) with the local federal district court. Upon arrest, the defendant appears for the first time before a federal magistrate or district court judge, whose duty it is to determine whether the defendant is extraditable.

At the extradition hearing, the judge first determines whether requirements for extradition have been met — for example, whether or not the offense with which the defendant is charged is one for which the treaty permits extradition, or whether the evidence submitted to the court supports a finding of probable cause that the defendant committed the offense alleged.\textsuperscript{117} The judge then may consider whether there are grounds for denying extradition. Bases for denial, such as a refusal to extradite a country’s own nationals, generally are explicit in a treaty. The magistrate’s or judge’s ruling on the issue of extraditability is separate from the issue of whether any other reasons exist for not extraditing the offender.\textsuperscript{118} Should a defendant anticipate unfair or abusive treatment following his extradition, he has historically been allowed to seek relief on that ground only from the Secretary of State because of the responsibility of that department for negotiation and enforcement of treaties, and, more broadly, for foreign affairs.

In fact, both domestically and internationally, the existence of an extradition treaty has traditionally triggered observance of the rule of judicial non-inquiry.\textsuperscript{119} Under this rule, a judge determining the extraditability of a defendant declines to examine the fairness of the requesting country’s judicial and penal systems or to consider the possibility that a defendant

\begin{itemize}
\item \textsuperscript{115} 18 U.S.C. §§ 3184, 3186 (1948).
\item \textsuperscript{116} Henning, \textit{supra} note 111, at 852.
\item \textsuperscript{118} \textit{See id.} at 89.
\end{itemize}
may be mistreated upon rendition to that country.\textsuperscript{120} A number of reasons underpin this practice. One involves the "political question" doctrine, under which courts do not consider issues that are more appropriately handled by executive or legislative branches of government. With regard to the issues of extradition and judicial non-inquiry, extradition is generally viewed as a tool of foreign policy, which is an arena traditionally belonging to heads of state, therefore inappropriate for judicial involvement.\textsuperscript{121} A second reason is that judicial review of the legal systems of states with differing ideologies allows notorious criminals to escape punishment.\textsuperscript{122} Further, a court's investigation of another nation's legal system to determine whether human rights violations exist has been considered an infringement upon that country's sovereignty and a violation of the international principle of comity.\textsuperscript{123} The rule of judicial non-inquiry assumes that the quality of justice in the receiving country was addressed in the original decision to negotiate and ratify an extradition treaty with the country in question. That is, courts have inferred from the existence of an extradition treaty mutual faith by each of the ratifying governments in the other's judicial processes, thereby rendering improper and unnecessary any further investigation in that area.\textsuperscript{124}

Over the past fifty years, crime has become increasingly globalization.\textsuperscript{125} International money laundering schemes, nuclear and biological weapons smuggling, international art thefts, and slavery all are examples of criminal acts involving persons, contraband, and illegal profits crossing international borders.\textsuperscript{126} A 1998 indictment and subsequent trial of twenty-six Mexican bankers and three Mexican banks for laundering drug money illustrates the nature of the complexity of international crime. The Mexican scheme involved banks in Mexico, Spain, and Venezuela, as well as south Florida trading companies, in money laundering by Colombian drug car-


\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}


\textsuperscript{124} MacDonald, \textit{supra} note 119, at 401.


\textsuperscript{126} \textit{Id.}
However, nothing in recent history so starkly illustrates the sophistication of a particularly lethal international crime — international terrorism — as do the terrorist attacks of September 11, 2001, on the Pentagon and New York City.

Osama bin Laden, the suspected mastermind of the September 11 attacks, has over the past ten years commanded his terrorist network's operations from a number of different countries, including Somalia and Afghanistan. Bin Laden's Al Qaeda network functions in part as an umbrella organization for other terrorist groups such as Al Jihad in Egypt, the National Islamic Front in Sudan, and Hizbollah, a radical Islamic group with ties to the Iranian government. Al Qaeda has operated training camps and guest houses in Pakistan, Afghanistan, Somalia, and Kenya; one of its cells may have masterminded the plot, mentioned previously, to blow up the Cathedral of Notre Dame in Strasbourg, France, in 2001. Mohammed Atta, one of the alleged September 11 airline hijackers, was a truly a citizen of the world. He traveled on a passport from the United Arab Emirates, lived and studied in Germany, and then moved to Florida in the United States. Financing for the hijackers' activities in the United States may have come through Swiss banks. The victims who died in the attacks were nationals from countries all around the globe. The grief and outrage caused by the September 11 attacks have moved nations, including the United States, to commit themselves with renewed energy and a heightened sense of urgency to work cooperatively in disrupting terrorist networks and bringing to justice those responsible for such terrible losses of life.

Coinciding with the growth in international crime has been the transformation in international law also previously mentioned in this article. The legal positivism that defined international law through the turn of the twentieth century has given way to a more communitarian view of international legal relations, including a recognition by governments that individuals are proper subjects of international law, with human rights that must be protected. The succession of multinational human rights agreements, drafted and ratified shortly after World War II, evidence this change in perspective. Language in the Preamble to the United Nations Charter of 1945,

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127 Id.
129 Id.
130 Id.
132 Id. at 30.
for example, articulates a commitment by U.N. members to “faith in fundamental human rights” and to the establishment of “conditions under which justice and respect for the obligations arising from treaties . . . can be maintained.” Specific human rights have been articulated in instruments such as the Universal Declaration of Human Rights, the Convention Against Torture, the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Further, some agreements have created judicial bodies for interpretation and enforcement of those individual rights. The United Nations Charter, for example, established the International Court of Justice; and the European Convention established the European Court of Human Rights.

The collision of increased transnational crime, particularly international terrorism, with a steadily expanding commitment to enforcement of human rights, has complicated the process of extradition. Treaties, executive acts and court decisions relating to this process all have been affected. As the human rights movement gains momentum, officials involved in the enforcement of extradition treaties have come under growing pressure to consider international human rights norms in deciding whether or not to grant a request to extradite a fugitive. That pressure has been particularly sharp since 1999 when the Treaty of Amsterdam came into force, explicitly incorporating the human rights standards set out in the European Convention on Human Rights into European Union law.

Article 6(2) of the Treaty on European Union (TEU), after its amendment by the Treaty of Amsterdam, provides that, “The Union shall respect fundamental rights, as guaranteed by the European Convention for

134 Universal Declaration of Human Rights, supra note 51.
135 Convention Against Torture, supra note 63.
136 ICCPR, supra note 20.
138 ECHR, supra note 19.
139 United Nations Charter, supra note 133, art. 7.
140 ECHR, supra note 19, art.19.
the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{143} The TEU further requires the European Court of Justice and the European Court of Human Rights, whenever either court has jurisdiction, to apply these same human rights standards to acts by the European Union (EU) institutions.\textsuperscript{144} Consequently, it is increasingly common for a requested European nation to be torn between honoring a bilateral extradition treaty and enforcing the human rights standards of the European Convention of Human Rights. In order to determine whether or not compliance with an extradition request from a treaty partner will violate a fugitive’s human rights, the requested nation’s judiciary more and more frequently is required to deviate from the traditional rule of judicial non-inquiry and look beyond explicit extradition treaty provisions to evaluate the substantive and procedural fairness of the requesting nation’s legal system.\textsuperscript{145}

Extradition controversies involving Jens Soering,\textsuperscript{146} Pietro Venezia,\textsuperscript{147} Ira Einhorn,\textsuperscript{148} and in November, 2001, the arrest by Spanish authorities of eight men believed to be connected with the September 11 attacks on the Pentagon and New York,\textsuperscript{149} all are examples of heated disputes among the United States and European nations arising from the abrogation of the rule of non-inquiry. The cases share important elements: the existence of a bilateral extradition treaty between the United States and the country into which an accused murderer has fled; a request by the United States for the extradition of the fugitive; and the requested European state’s refusal to extradite because of human rights violations that it believed would occur within the American legal system. More narrowly, the cases indicate a trend toward a broadening of the bases on which foreign nations (including but not limited to states which are party to the European Convention on Human Rights) are refusing to comply with American extradition requests. Viewed as functional inroads, the increasingly frequent decisions of the United States Department of State and of the United States military not to seek the death penalty as a condition of a European government’s granting an American extradition request appear to constitute a widening incursion

\textsuperscript{143} The Treaty on European Union (as amended by the Treaty of Amsterdam), O.J. C 340/173, Nov. 10, 1997, art. 6(2).
\textsuperscript{144} Id., art. 46(d).
\textsuperscript{145} Semmelman, supra note 120, at 1213.
\textsuperscript{148} See infra text accompanying notes 171-181.
\textsuperscript{149} Sam Dillon with Donald G. McNeil Jr., Spain Sets Hurdle for Extraditions, N.Y.TIMES, Nov. 24, 2001, at A1
into America's historic disregard for European opinion about the practice of capital punishment.  

IV. Evidence of Widening Inroads
A. Abrogation of the Rule of Non-Inquiry and the Death Penalty Phenomenon: The Soering Case

One of the most important international extradition controversies between the United States and a European state involved a German national named Jens Soering, who murdered his girlfriend's parents in Virginia in 1985. Following the killing, Soering fled to the United Kingdom. When he was arrested there for check fraud, a Virginia grand jury indicted him for capital murder, and the United States sought his extradition in order that he be tried for murder in the State of Virginia.

Great Britain has banned the death penalty for all but a very few offenses. The ban is reflected in the U.S.-United Kingdom extradition  

150 In a resolution adopted on January 24, 2002, the Parliamentary Assembly of the Council of Europe expressed its concern about threats to human rights resulting from post-September 11 steps taken to combat terrorism. *Combating Terrorism and Respect for Human Rights*, Eur. Parl. Ass. Res. 1271 (2002 Session-First Part). The resolution called upon member states to align any counter-terrorism steps taken with national and international law, and to respect human rights. *Id.* at para. 5. It also called upon member states to refuse to extradite suspected terrorists if extradition would subject the defendants to execution upon conviction. *Id.* at para. 7.


treaty which states, "If the offense for which extradition is requested is punishable by death under the relevant law of the requesting party, but the relevant law of the requested party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting party gives assurances satisfactory to the requested party that the death penalty will not be carried out."\textsuperscript{152} After receiving assurances from the State of Virginia that Great Britain's wishes would be represented to the Virginia judge during Soering's sentencing, Britain's Foreign Minister approved the extradition request.\textsuperscript{153}

However, Soering appealed Great Britain's decision to the European Court of Human Rights (ECHR). He based his appeal on three arguments, only one of which is relevant to this article. That argument was that extradition would expose him to the "death row phenomenon," the mental anguish that would result from prolonged uncertainty during the appeals process combined with severe conditions of confinement.\textsuperscript{154} Soering argued that subjecting him to the death row phenomenon amounted to inhuman or degrading treatment, prohibited by Article 3 of the European Convention on Human Rights.\textsuperscript{155} The ECHR held unanimously that there would be a violation of Article 3 of the Convention if Great Britain enforced the extradition to Virginia, and allowed Great Britain to extradite Soering to Germany, thereby sparing the British government from having to choose between conflicting treaty obligations.\textsuperscript{156}

\textsuperscript{152} See Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8,468, art. IV, which states, "If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested party that the death penalty will not be carried out."

\textsuperscript{153} Henning, supra note 111, at 357.

\textsuperscript{154} Soering, supra note 146, at 463.

\textsuperscript{155} ECHR, supra note 19, art. 3, which states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

\textsuperscript{156} Soering, supra note 146. In August of 1989, despite the ruling of the ECHR, the British and U.S. governments negotiated an agreement which allowed Mr. Soering to be extradited to the U.S. for trial in Virginia, in exchange for the reduction of charges by the State of Virginia against Soering from capital to non-capital murder, for which the death penalty could not be imposed. Because, according to Mr. Douglas Hurd, England's Home Secretary, "no breach of the Convention would arise if the possibility of a capital sentence were removed," the ruling of the court was deemed no longer relevant to Soering's extradition. See John Carvel, Britain and U.S. to Circumvent European Court Extradition Ban, GUARDIAN
However, the *Soering* decision set a precedent that has changed European states' observance of the rule of non-inquiry. By allowing Soering to argue the inhumanity of the death row phenomenon, the ECHR made it necessary for Great Britain to investigate the truth of Soering's claims about Virginia's penal system. In investigating the credibility of the death row phenomenon, Great Britain went beyond the extradition treaty's terms of what constituted exceptions to the obligation to extradite, and investigated the quality of justice in the Virginia, thereby abandoning the rule of judicial non-inquiry. Further, through its ruling that the U.K.'s observance of its obligations under its bilateral extradition treaty with the *U.S.* would violate an international human rights agreement, the *Soering* decision established the precedent that the European Convention should take precedence over extradition treaties because of the importance of protecting fundamental human rights.\textsuperscript{157}

B. Sufficiency of Assurances: The Venezia Case

Italian national Pietro Venezia came to America in 1977, working for several years as a waiter at local restaurants and eventually purchasing his own restaurant. In 1988, Venezia was served with a notice from the State of Florida informing him that his assets were frozen because of a delinquent tax bill. Venezia tracked down David Bonham, the state tax inspector who had notified Venezia that his assets were frozen, and shot him to death.\textsuperscript{158} Venezia subsequently fled the country; the U.S. government immediately began an international search for him. In 1994, Italian police arrested Venezia in Laterza, Italy. Venezia made a full, voluntary confession, and the United States and Italy commenced extradition proceedings.\textsuperscript{159}

In November of 1994, a local Italian court approved Venezia's extradition. Pursuant to the 1983 extradition treaty between the U.S. and *It-


\textsuperscript{158} DeWitt, *supra* note 123, at 566.

\textsuperscript{159} See *id.*
aly, the Italian Justice minister reviewed the extradition request.\textsuperscript{160} Also pursuant to the treaty, the Minister asked for assurances from U.S. officials that the death penalty would not be imposed by the State of Florida.\textsuperscript{161} After the U.S. Department of Justice gave its assurances that the State of Florida would not seek capital punishment for Venezia, the Italian Justice Minister finally approved Venezia’s extradition to the United States in December of 1995.\textsuperscript{162} However, because of strong public and political pressure, the extradition order was blocked by the ruling of a regional administrative court in Italy, and Venezia’s case was forwarded by that tribunal to the Italian Constitutional Court.\textsuperscript{163}

The Constitution of Italy allows its citizens to be extradited only in cases “expressly provided for in international conventions.”\textsuperscript{164} The 1983 Extradition Treaty between Italy and the U.S. does not bar the extradition of nationals.\textsuperscript{165} However, Article 27 of the Italian Constitution guarantees an absolute right to life by prohibiting the use of capital punishment.\textsuperscript{166} Therefore, where the death penalty was a possible punishment for a fugitive sought by a foreign government, the Italian government, pursuant to the treaty, was allowed to refuse to extradite if the requesting government did not provide sufficient assurances that capital punishment would not be im-

\textsuperscript{161} \textit{Id.}, at 35 U.S.T. 3031, which provides that, “extradition shall be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.”
\textsuperscript{162} Dewitt, \textit{supra} note 123, at 569.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textbf{ITALIAN CONSTITUTION}, art. 26. \textit{See also} Maslow, \textit{supra} note 110, at 406.
\textsuperscript{165} Extradition Treaty, Oct. 13, 1983, Italy-U.S., \textit{supra} note 160. Article IX of the treaty provides that when the offense for which extradition is requested is punishable by death under the laws of the requesting Party, extradition shall be refused, unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed. \textit{See also} Maslow, \textit{supra} note 110, at 407.
\textsuperscript{166} \textbf{ITALIAN CONSTITUTION}, \textit{supra} note 164, art. 27(4), which states, “Punishment must not consist of measures contrary to humane precepts and shall aim at reforming the person upon whom sentence is passed. The death penalty is not admitted save in cases specified by military laws in time of war.” The death penalty was also abolished in Italian military law by Article 1 of Act No. 589, Oct. 13, 1994. \textit{See also} Maslow, \textit{supra} note 110, at 407.
posed. After considering Venezia's appeal, the Italian Constitutional Court blocked his extradition and ordered that Venezia be tried in Italy.\footnote{DeWitt, \textit{supra} note 123, at 572.}

The court based its opinions on two principal concerns, one of which is particularly relevant to the issue of judicial non-inquiry. In its ruling, the court seemed conflicted about the sufficiency of the U.S. government's assurances with regard to the imposition of capital punishment on Venezia. While the Constitutional Court ultimately wrote that it believed that the U.S. Constitution's Supremacy Clause would control the enforceability of federal assurances in a Florida court, the judges also discussed their concerns about an American state's autonomy in sentencing criminals. Rather than resolving this conflict, the court, like the European Court of Human Rights, decided Venezia's appeal on a different ground. The court nullified the capital punishment provision of the U.S.-Italy extradition treaty and an implementing Italian statute, interpreting the "sufficient assurances" language in the extradition treaty provision and legislation as giving the Justice Minister too much discretion to judge the reliability of a requesting state's assurances against the use of capital punishment. The discretion in the treaty and statute, the court believed, was irreconcilable with the Italian Constitution's absolute protection of the right to life.\footnote{Venezia, \textit{supra} note 147.}

In ruling as it did, the Italian Constitutional Court reiterated its opposition to capital punishment in the United States, and also implied a concern about its faith in the assurances of the U.S. federal government. Had the court believed that the federal government could, when requested pursuant to a treaty to do so, give absolute assurances on behalf of an American state (in this case, the State of Florida) that a requested fugitive would not be sentenced to death, then the court's concerns about "unconstitutional discretion" given to the Justice Minister by treaty and statute would have been moot. It is true that the Venezia controversy gave the Constitutional Court an opportunity to take strong, politically popular anti-death penalty action by nullifying domestic law and part of an international agreement which, in the court's view, did not protect absolutely the right to life.\footnote{See Dewitt, \textit{supra} note 123, at 575.} It is also true that the court's holding did not assert an explicit lack of faith in the ability of the U.S. federal government to enforce its assurances in a state court. However, the court could have interpreted the "sufficient assurances" language to mean "absolute assurances," thereby protecting the right to life of fugitives sought by the U.S. government while avoiding the suggestion that the court did not have unequivocal faith in the
power of the U.S. government to enforce its guarantees. In choosing not to interpret “sufficient assurances” in favor of its international agreement with the United States, the Italian Constitutional Court arguably expressed a lack of faith in the power of the United States to honor its assurances to Italy. In so doing, the Italian judiciary added a basis for the non-application of the rule of judicial non-inquiry to that established by Soering.

C. Procedural Due Process and Human Rights: the Einhorn Case

In 1977, “hippie guru” Ira Einhorn murdered his girlfriend, Holly Maddux, in Philadelphia, Pennsylvania. In 1981, just before his trial began, he fled to Ireland. For the next sixteen years, living under an assumed name, he evaded capture. In the meantime, Einhorn was tried and convicted in absentia for Maddux’s murder, under a Pennsylvania statute allowing such proceedings. Subsequent to the conviction, the Philadelphia District Attorney’s office continued to search for Einhorn. In 1997, Einhorn was finally arrested in Mallon, France.

The ensuing extradition proceeding proved to be extraordinarily frustrating for the United States. Ira Einhorn hired Dominique Tricaud, a French attorney, to represent him. Tricaud argued successfully to the French Appeals Court that Einhorn’s Pennsylvania trial and conviction in absentia violated principles of the European Convention of Human Rights, and also ran contrary to French domestic law, which guarantees a new trial after capture for a suspect convicted in absentia. Although the French prosecutor argued that the trial in absentia should not be considered in the United States’ extradition request, the court did consider Einhorn’s in absentia conviction and decided to deny the U.S.’s request, the procedural consequence of which was that Einhorn went free.

Hoping to cure the French judiciary’s objection to Einhorn’s extradition, the Pennsylvania legislature promptly amended its trial in absentia statute to allow for new trials (“under certain circumstances”!) for persons

170 Id. at 578.
171 Henning, supra note 111, at 370.
172 Id.
173 Id.
174 Id., at 347.
sentenced in absentia. A second arrest by French police, and a renewed request for Einhorn’s extradition, followed. At his extradition hearing in Bordeaux, Einhorn’s attorneys attempted to have the court block this second request, arguing that the “Einhorn Amendment” (the Pennsylvania rule granting a second trial for a narrow set of persons convicted in absentia) was invalid. Einhorn’s attorneys also argued that, regardless of the potential invalidity of the amended Pennsylvania law, if Einhorn were tried and convicted under it he could receive a sentence of death. Pursuant to the terms of its extradition treaty with France, the United States made assurances to the French government that Pennsylvania would not seek to have Einhorn executed should he be convicted, and the extradition order was finally carried out.

The United States’ extradition treaty with France does not bar extradition to a requesting country when the requesting country has tried and convicted the fugitive in absentia; in fact, the treaty does not mention the matter at all. Article 8 of the treaty does bar extradition when the person sought has been finally convicted in the requested state for the offense for which extradition is requested. Article 7 of the treaty states that the requested state may refuse to extradite a suspect when capital punishment is a sentencing option in the requesting state. However, Ira Einhorn had not been convicted of murder in France; and even had he been, that was not the basis for the French Appeals Court’s blocking his extradition. Nor, initially, did the Court of Appeals focus on the fact that capital punishment is a sentencing option for murder in Pennsylvania. It was not until the later stages of the Einhorn controversy that the French judiciary’s basis for blocking Einhorn’s extradition became a term of the extradition treaty itself

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176 Henning, supra note 111, at 372.
177 Id.
178 Extradition Treaty, Apr. 23, 1996, United States-France, S. Treaty Doc. No. 105-13, 1996 WL 905553 (1996), art. 7. Art. 7(1) permits denial of an extradition request for an offense punishable by death in the Requesting State but not in the Requested State, unless the Requesting State provides the assurance that the death penalty will not be imposed, or if imposed, will not be carried out. Article 7(2) declares that the death penalty, if imposed by the courts of the Requesting State, shall not be carried out in instances when a Requesting State has provided an assurance in accordance with Article 7(1).
179 Extradition Treaty, United States-France, supra note 178.
180 Id. art. 8(8).
181 Id. art. 7(1).
DEATH PENALTY EXTRADITION

(that of the possibility of capital punishment). At Einhorn's first extradition hearing the Appeals Court chose to consider the question not addressed in the treaty, that being whether or not Einhorn's due process rights had been violated by a trial in absentia; and, at his second hearing, the court inquired into the legality of the ad hoc Pennsylvania legislation permitting Ira Einhorn to be tried a second time for Holly Maddux's murder. Thus the court inquired, as did the courts which considered the Soering and Venezia cases, into apparent violations of a fugitive's human rights. The French court in the Einhorn matter indicated strongly that a human rights issue, arising from a perceived procedural due process violation, should take precedence over a bilateral extradition agreement.

D. The Tribunal Itself: Spain and Eight Islamic Extremists

After the September 11, 2001, the United States appealed to the world community to cooperate in bringing to justice those responsible for the terrorist attacks on Washington, D.C. and New York City. In November, after weeks of intense, international information-gathering and investigation, Spanish authorities arrested eight Islamic extremists and charged them with complicity in the World Trade Center bombings. The United States government has not yet formally requested of the Spanish government that the eight extremists be extradited for trial; however, the topic has been broached. As of early December, 2001, the Spanish government has declined to assure the United States that the request will be honored. The sticking point for the Spanish involves a new basis for non-application of the rule of judicial non-inquiry into an American extradition request — the nature of the tribunal before which the defendants' trials would be conducted.

The tribunal that is the object of Spanish concern — more broadly, the object of many European nations' officials' concern — is the military commission established through a military order issued on November 13, 2001, by President George Bush. Some of the concerns of the Spanish government stem from section 4 of the order, which authorizes the imposition of capital punishment on those defendants convicted by the commission. Other concerns attach to the potentially secret nature of the proceedings, the potential bias of the United States officers who would sit as "triers of both fact and law"; and the preclusion by the order of any privilege of appeal by

182 Dillon & McNeil, supra note 149.
183 Id.
a defendant to any state or federal court in the United States, or "to any
court of a foreign nation, or to any international tribunal."184

President Bush's military commission implicates all of the issues
from which the extradition controversies previously described in this paper
stem. For example, the United States' executive branch is well aware of the
European Union's opposition to the use of capital punishment; the State
Department is aware as well that the EU has a policy of relieving member
states of the requirement to extradite, absent "believable assurances that the
death penalty will not be asked for or applied."185 Moreover, Spanish pros-
secutors have warned American diplomats and a representative of the Fed-
eral Bureau of Investigation that a military tribunal will not meet European
standards for judicial proceedings incorporated into Spanish law by the
Amsterdam Treaty.186 Thus, rather than a single issue such as the death row
phenomenon or a due process concern, it is likely to be an entire institution
established by military order that will move the Spanish government to re-

E. Military Jurisdictional Waivers: SOFA and Short

The same collision of human rights developments and interest in
criminal law enforcement is creating tension between U.S. military authori-
ties and host European nations' justice officials with regard to the use of
capital punishment by American military courts. Over the past ten years a
number of conflicts which parallel the civilian extradition conflicts de-

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184 Id. See also Mil. Order of Nov. 13, 2001, supra note 105. For consideration of
the political, security, and legal risks associated with different types of tribunals for
prosecution of September 11 defendants, see William Glaberson, U.S. Faces Tough
185 Dillon & McNeil, supra note 149.
186 Id.
187 In addition to resistance by the government of Spain to the extradition of al-
leged terrorists, the French and German governments have declined to provide evi-
dence of Zacarias Moussaoui's association with Al Qaeda, in light of the fact that
Moussaoui is charged with four capital offenses in connection with the September
11 attacks. For a brief examination of conflicts created by coexisting German and
French prohibitions on capital punishment, Council of Europe human rights obliga-
tions, and international cooperation in the prosecution of terrorism, see Steven
Erlanger, German Chancellor Hopes to Release Evidence Soon, N.Y. TIMES, June
12, 2002, at A22. For conditions under which the German government has recently
agreed to provide evidence for use by the prosecution against Moussaoui, see
Christopher Marquis, Germany Agrees to Share Evidence Against 9/11 Defendant,
scribed earlier in this article have arisen in important North Atlantic Treaty Organization (NATO) member countries, like Germany, Italy, and the Netherlands. One case, *Short v. Netherlands*,\(^\text{188}\) illustrates clearly the inroads being made in a military context into America's disregard for European opposition to the death penalty. Since 1949, the United States has maintained military bases in a number of different European countries pursuant to its membership in NATO. The question of jurisdiction over American military personnel alleged to have committed criminal offenses in host states has been addressed by the NATO Status of Forces Agreement (SOFA)\(^\text{189}\) which regulates the stationing of U.S. forces in Europe and sets out the procedures concerning exercise of criminal jurisdiction.\(^\text{190}\) Under the SOFA scheme, most criminal offenses allow for concurrent jurisdiction,\(^\text{191}\) in which cases each state (U.S. and host nation) may waive its respective right to prosecute an offender and allow the other government to assert jurisdiction over an accused.\(^\text{192}\) Because of the United States military's interest in trying its own personnel for alleged criminal offenses,\(^\text{193}\) many NATO host states have negotiated bilateral agreements with the U.S. generally to waive their jurisdictional rights, allowing the U.S. military to prosecute its own personnel.\(^\text{194}\)

In March of 1988, U.S. Air Force Sergeant Charles Short, stationed at a Netherlands air base, murdered his Turkish wife.\(^\text{195}\) After his arrest by

\(^{188}\) *Short v. Netherlands*, No. 88/164 and 88/615 (District Court, the Hague, May 9, 1988). For a related, but more general analysis of international criminal jurisdiction issues confronting the U.S. armed forces overseas (e.g., the military’s lack of jurisdiction over American family members and civilian workers, and the impact of changing attitudes among U.S. allies with regard to S.O.F.A. criminal jurisdiction concerns), see Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, 2000 Army Law 23 (2000).


\(^{191}\) *Id.* at 46.

\(^{192}\) *Id.* at 47.

\(^{193}\) *Id.* at 49.


\(^{195}\) *Short*, *supra* note 188.
U.S. military police, Short confessed to Dutch authorities.196 The U.S. military requested that the Dutch government waive jurisdiction over Sergeant Short.197 The Dutch judge assigned to Short’s case, explaining that a fundamental principle of Dutch law is that capital punishment should be avoided to the extent possible, international treaty obligations notwithstanding, declined to render Short to U.S. military police without a guarantee that any death sentence imposed pursuant to a court martial would not be executed.198 U.S. authorities refused to make any such guarantee.199 Absent that promise, the Dutch government refused to surrender Short. Instead the Dutch tried Short and convicted him of homicide, committing him to a mental institution subsequent to a six-year prison sentence.200

Essentially, Short is the military analog to Einhorn and Venezia (although with the interesting distinction that, instead of placing an international human rights agreement over a bilateral extradition treaty, the Dutch government subordinated an international agreement to its own domestic human rights law). Short is further evidence that, notwithstanding a bilateral extradition treaty or its military equivalent, European states bound by international law or their own domestic concerns about capital punishment will act in a way that forces the United States to align its practice functionally with European beliefs about the death penalty, or suffer frustration of criminal justice objectives.

V. Conclusion

The research conducted for this article was provocative and troubling. It showed a striking divergence between European and American regard for provisions and principles of international human rights agreements. It showed a shocking picture of the flaws in the United States’ death penalty schemes. And it showed that the traditional indicators of a democratic society’s will — case law, statutes, administrative policy — suggest that, at least until very recently, European opinion about the death penalty mattered not one iota to the United States government.

But the research showed two things more. First, in increasing numbers, case by case, the United States is agreeing not to impose the death penalty on defendants in order to secure them from detaining European states’ jurisdictions. Second, the costs of ignoring European opinion are

196 Id.
197 Id.
198 Id.
199 Parkerson & Stoehr, supra note 190, at 59-60.
200 Id.